

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-2137

To be argued by
STEVEN LLOYD BARRETT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
LEON BUSH,

Petitioner-Appellant,

-against-

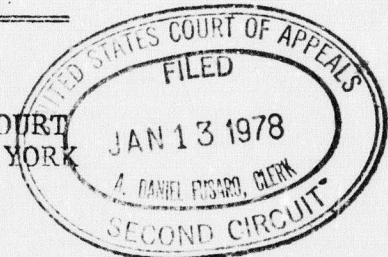
DAVID R. HARRIS, Superintendent,
Green Haven Correctional Facility,

Respondent-Appellee.
-----X

AB5
Docket No. 77-2137

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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FOGG, WALTER

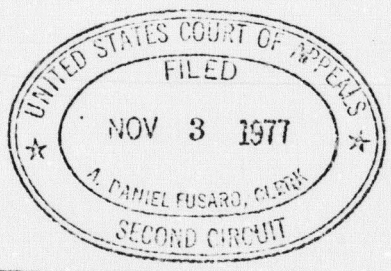
WALTER FOGG, Acting Superintendent
Green Haven Correctional Facility

CAUSE

28 U.S.C. § 2254
HABEAS CORPUS

ATTORNEYS

FOR PLTFF:
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STATES DISTRICT COURT DOCKET

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BUSH vs FOGG

DATE	NR.	PROCEEDINGS
9-10-76		Petition for a writ of habeas corpus filed. (1)
9-21-76		BY PRATT, J.- Order to show cause dtd 9-20-76 why a writ of Habeas Corpus should not be issued etc. filed. Copies mailed to Atty Gen and plntff. (2)
10-5-76		By PRATT, J.- Order dtd. 10-1-76 extending time to respond to petition to 10-25-76 filed. (3)
11-8-76		By PRATT, J.- Order dtd 11-4-76 extend ing time for respondent to answer petition to 11-24-76 filed. (4)
11-23-76		Affidavit in opposition filed. (5)
12-3-76		Petitioner's reply to affidavit in opposition filed. (6)
5-25-77		By PRATT, J.- Memo and order dtd, 5-23-77 dismissing the petition a writ of habeas corpus filed. (7)
5-25-77		Judgment that the petitioner take nothing of the respondent and that the petition is dismiss filed (8)
9/21/77		Notice of appeal with request for certificate of probable cause filed. tk (9)
10-3-77		By PRATT, J.- Memorandum and order dtd 9-28-77 filed that certific of probable cause is to issue and permission to proceed with appeal in forma pauperis is granted. FILE CERTIFIED AND MAILED TO C OF A

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IN RE: [REDACTED]
U.S. DISTRICT COURT E.D.N.Y.

★ MAY 25 1977 ★

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TIME A.M.
P.M.

LEON BUSH,

DOCKET NO. 76 C 1676

Petitioner,

FILED

- against -

MEMORANDUM AND ORDER

WALTER FOGG, Superintendent, Green
Haven Correctional Facility,

Respondent.

PRATT, J:

By petition for a writ of habeas corpus, 28 U.C §§ 2241 & 2254, filed pro se, Leon Bush seeks to vacate his conviction on September 23, 1971 in the New York Supreme Court, Kings County, for felony murder and second-degree manslaughter, for which he is now serving concurrent terms of 15 years to life, and 15 years, respectively. For the reasons set forth below, his petition must be dismissed on its merits. ^{1/}

I.

On February 17, 1970, Bush was arrested in connection with the killing and robbery of one Robert Wheeler on August 30, 1969 in Brooklyn, New York. After being taken

to the local police station, Bush confessed to the stabbing and robbery of Wheeler -- first orally, then in a signed writing, and finally, orally in the presence of a stenographer. After a jury trial, he was convicted of felony murder and second-degree manslaughter, a lesser-included offense of the crime of common law murder charged in his indictment. The State's case was based to a large extent upon Bush's confessions. In an attempt to establish an alibi, he adduced testimony of friends and relatives to the effect that he had been in New Orleans at the time of the crime. Bush himself testified that on August 27, 1969, three days prior to the stabbing, he left Brooklyn for New Orleans where he remained until the following December. In rebuttal, the State elicited testimony that he had been in Brooklyn throughout August and the first half of September of 1969.

II.

Citing Morales v. New York, 396 US 102 (1969), Bush made a pretrial attempt to suppress his confessions on the ground that they constituted inadmissible fruit of his illegal arrest. See Brown v. Illinois, 422 US 590 (1975). The trial court held an extensive evidentiary hearing to determine whether there had been probable cause for the

warrantless arrest, as well as the separate issue whether Bush's confessions had been voluntary. State's appendix on appeal to New York Court of Appeals [A.], at 1-239. The trial judge held that the arresting "officer [a Detective McCarthy] had probable cause to take the defendant in custody," A. at 81, accord, A. at 245, and indicated that this conclusion was at least primarily based on a finding that, before arresting Bush, Detective McCarthy, had been informed that, shortly after Robert Wheeler was killed, Bush had admitted stabbing a man. See A. at 245. See also A. 67-72.^{2/}

Bush now seeks to vacate his convictions on the grounds that the trial judge erred in finding probable cause for the arrest and that the confessions which ensued should have consequently been suppressed. But under the circumstances here, the "full and fair litigation" doctrine articulated in Stone v. Powell, 96 Sct 3037 (1976), and Simmons v. Clemente, (CA2 Mar 24, 1977), bars this court from granting federal habeas corpus relief on these grounds.

In Stone, the Supreme Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that

evidence obtained in an unconstitutional search or seizure was introduced at his trial." 96 SCt at 3052 (footnotes omitted). While Stone involved evidence obtained in allegedly unlawful searches, in Simmons v. Clemente the Second Circuit applied Stone where, as here, unsuppressed evidence had been obtained as a result of an allegedly unlawful arrest.

The question remains, of course, whether Bush has been provided an opportunity for full and fair litigation of his fourth amendment claim. I hold that he has, since he has been afforded no less of an opportunity to litigate his claim than that afforded the petitioners in Stone. As noted previously, the constitutionality of Bush's arrest was determined upon factual and legal conclusions arrived at by the trial court after a lengthy evidentiary hearing. While, unlike the petitioners in Stone, Bush did not seek direct review of this particular determination, he had the "opportunity" to do so.^{3/} In short, petitioner has been "afforded the opportunity for full and fair consideration of [his] reliance upon the exclusionary rule * * * at trial and on direct review." Stone v. Powell, supra at 3049. Accordingly, he may not now invoke the rule again on federal habeas corpus review.

III.

Petitioner contends that, even if his arrest was lawful, his confession should have been suppressed as involuntary. In the pretrial suppression hearing, the trial court heard extensive testimony on the voluntariness issue and decided it against petitioner.

The only evidence elicited at the hearing which supported petitioner's claim that his confessions were involuntary was his own testimony. He stated that he had confessed only after being punched, kicked, and beaten with a night stick by Detective McCarthy, and possibly others. McCarthy, who elicited the confessions, denied these allegations and testified that Bush confessed voluntarily after approximately one hour of questioning. Bush's claims of coercion were also contradicted by both the assistant district attorney and the stenographer who witnessed his third and final confession; by a Detective Byrnes who was present during the first (oral) confession and part of the second (written) one; by the correction officer who processed Bush for arraignment the following afternoon; and by a Department of Corrections doctor who examined him two days after he confessed. Petitioner conceded at the hearing that he had been promptly

advised of his Miranda rights.

At the conclusion of the hearing, the trial judge found as follows:

I do not credit from the testimony adduced that the defendant was any wise threatened, intimidated, assaulted, beaten by the detective or anyone else in the stationhouse, and I discount that testimony completely irrespective of the rebuttal, on his own testimony that he gave. But the rebuttal aided me to agree in rejecting his claim of having been beaten.

So I hold that beyond a reasonable doubt the prosecution has established the oral statement, the written statement, and stenographic statement had been made voluntarily, and I rule that each of them is admissible.

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Finding more than ample support in an extensive record which petitioner has not sought to supplement, this conclusion may not be disturbed. 28 USC §2254(d). LaVallee v. Delle Rose, 410 US 690, 694-95 (1973); United States ex rel. Lewis v. Henderson, 520 F2d 896, 903-04 (CA2 1975).

IV.

The jury that convicted Bush was selected pursuant to former Rule 20.13 of the Administrative Board of the Judicial Conference (the rule), 22 NYCRR 20.13 (1971). The

rule provided in pertinent part:

The judge shall * * * put to the prospective jurors any questions which he thinks necessary, affecting their qualifications to serve as jurors in the cause on trial. The judge may also, in his discretion, permit both parties, commencing with the People, to examine the prospective jurors individually or collectively to the extent he deems necessary, regarding their qualifications to serve as jurors.

Citing Swain v. Alabama, 380 US 202, 219 (1965), petitioner contends that the trial court's application of the rule, over his attorney's objection, precluded the meaningful exercise of his peremptory challenges and consequently violated his constitutional right to an impartial jury.^{4/} Bush appears to be concerned primarily with the fact that the rule afforded the trial judge the discretion to disallow questioning of veniremen directly by counsel. However, the provision of similar discretion to federal judges under FRCrP 24(a) has been held constitutional. United States v. Anderson, 433 F2d 856, 858 (CA8 1970); United States v. Duke, 409 F2d 669, 671 (CA4 1969), cert. denied, 397 US 1062 (1970); Rodgers v. United States, 402 F2d 830, 831 (CA9 1968). In addition, petitioner does not argue that special circumstances dictated that his attorney be allowed personally to examine the prospective jurors.

Bush may also be arguing that his right to an impartial jury was violated by the trial court's collective examination of the prospective jurors.^{5/} But he does not even allege that his attorney made a request that a particular question be put to the veniremen individually, or collectively. Absent such a request, let alone any allegation of specific prejudice resulting from one's denial, the selection of petitioner's jury can in no way be considered to have been unconstitutional. See United States v. Dansker, 537 F2d 40, 55-57 (CA3 1976).

V.

Petitioner claims that his conviction and sentencing for the crimes of felony murder and second-degree manslaughter violated his constitutional right not to be twice placed in jeopardy. See Benton v. Maryland, 395 US 784, 787, 794 (1969). Essentially, he contends that he is being punished twice for the same homicide. See North Carolina v. Pearce, 395 US 711, 717 (1969).

In Blockburger v. United States, 284 US 299, 304 (1932), the Supreme Court reaffirmed its previous adoption of the language of the Supreme Court of Massachusetts in Morey

v. Commonwealth, 108 Mass 433, 434 (1871):

A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

Under then §125.15(1) of New York's Penal Law, Bush's second-degree manslaughter conviction necessitated a finding that he killed Robert Wheeler "recklessly", and under then NYPL §125.25(3) his felony murder conviction necessitated a finding that, when he stabbed Wheeler, he did so "in the course of and in furtherance of" the commission of a robbery. However, the second-degree manslaughter conviction did not necessitate proof of a predicate felony, here robbery, and the felony murder conviction did not necessitate proof that Wheeler's death was caused "recklessly". Consequently, each statute under which Bush was convicted required "proof of an additional fact which the other [did] not".

While this formulation has come under serious criticism since it was last approved by the Supreme Court in Blockburger v. United States, to apply it here would not be "to extend it to the point of rigid formalism", see United States v. Cioffi, 487 F2d 492, 496-98 (CA2 1973), since each

of petitioner's convictions "required proof of a significant fact not required to sustain the other", contrast United States v. Sabella, 272 F2d 206, 211 (CA2 1959) (emphasis added). Consequently, petitioner's double jeopardy claim is meritless.^{6/}

VI.

Moments after indicating that he had concluded the People's case, the prosecutor sought to enter the victim's pocket knife and sunglasses into evidence. The court allowed him to do so over defense counsel's objection. Petitioner implies that this constitutes a basis for vacating his convictions. The contention is frivolous. Under both New York and federal law, a trial judge may in his sound discretion allow the prosecution to reopen its case. People v. Olsen, 34 NY2d 349, 353 (1974); People v. Benham, 160 NY 402, 437 (1899); United States v. Jones, 480 F2d 1135, 1137 (CA2 1973). Clearly, there was no abuse of discretion here, much less any error of constitutional proportions.

VII.

Petitioner claims that his right to a fair trial was violated by statements made by the prosecutor in his

summation. This contention would be cognizable for purposes of federal habeas review only if the challenged statement violated Bush's right to due process. Donnelly v. DeChristoforo, 416 US 637, 642 (1974). "Simply stated, the due process test is whether the prosecutor's remarks were so prejudicial as to deprive the defendant of a fair trial." Malley v. Connecticut, slip op at 1035 (CA2 Dec 20, 1976). Here, Bush appears to be objecting to two aspects of the prosecution's summation.

When arrested, Bush identified himself as his brother Donald. In his direct testimony, he explained that he had done so because he had his brother's identification on him at the time, and because he had just been released from jail where he had been held under his brother's name. A. 553-54. Petitioner now objects to the prosecution's suggestion in its summation that he concealed his identity from the detectives who arrested him because he knew they were looking for him, and not his brother.

At trial, defense counsel objected to the implication that the jury could infer consciousness of guilt from these circumstances. A. 715-16. The judge overruled the objection and explained to the jury that, depending on their

view of the evidence, they could either accept or reject the inference. The court's ruling appears to have been proper and certainly did not constitute constitutional error.

Petitioner's second objection to the prosecution's summation relates to a remark made about his alibi defense. In defense counsel's closing statement, he emphasized that two of the three witnesses whose testimony rebutted petitioner's alibi had surfaced only two or three weeks before the trial. A. 697. In its summation, the prosecution responded to this argument as follows:

These two people testified, as Mr. Roseman said, they only came forward three weeks ago. It was not necessary to look for them until Mr. Bush brought up the alibi. Do you think when a man confesses to a crime, that the police department has nothing else to do but to go out and try to find every person that ever knew him? We had three confessions from him. But now he injects a new fraud.

A. 728.

Defense counsel objected to the remark "now he injects a new fraud", arguing in the presence of the jury that the prosecution had known of Bush's alibi defense since his testimony before the grand jury, more than a year before. Petitioner makes the same argument here.

VIII.

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If you believe the alibi, you must acquit the defendant. If you disbelieve the alibi, you will then consider the confessions attributed to the defendant; so that even if you reject the alibi, you must go further and find that the confessions attributed to the defendant were made by him, were true and were accurate and voluntary. A. 795.

Viewed in isolation, this instruction is troublesome since it does not mention the prosecution's burden to disprove Bush's alibi beyond a reasonable doubt. But especially in a habeas corpus proceeding, "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." Cupp v. Naughten, 414 US 141, 146-47 (1973). Here, in the paragraph preceding the challenged instruction, the court explained to the jury:

First, with respect to the alibi, the prosecution must prove to your satisfaction beyond a reasonable doubt that the alibi offered by the defendant is false. Second, the prosecution must likewise prove to your satisfaction beyond a reasonable doubt that the confessions attributed to the defendant and [sic] were made by him, were true, accurate and voluntary. A. at 794.

Thus, the court emphasized the prosecution's burden of proving beyond a reasonable doubt both the untruthfulness of Bush's alibi and the accuracy and voluntariness of his con-

fessions. See also A. at 784-85.

IX.

Bush also contests the adequacy of the trial court's charge on the requirement of then §395 of New York's Code of Criminal Procedure that a defendant's murder confession be corroborated by outside evidence of the crime. Specifically, petitioner objects to the following portion of the charge:

If you should determine on all of the evidence in the case, submitted to you that the defendant made true, accurate and voluntary confessions, and if you further determine that there was additional evidence outside of the confessions that the crime charged was committed, then you would be justified in finding the defendant guilty of the crime or the degree of the crime concerning which I charged you. You must be satisfied of each of these elements beyond a reasonable doubt.

On the other hand, if you are not so convinced beyond a reasonable doubt, you must reject the confessions and acquit the defendants [sic], because in this case, outside of the confessions, there is no evidence whatsoever to connect the defendant with the commission of the crime.

A. 795.

Section 395's corroboration requirement, however, was satisfied by evidence of the victim's "body, bearing

marks of murder, 'tokens of a fatal wound'. People v. Louis, 1 NY2d 137, 141 (1956). Here, the trial court correctly instructed the jury that, if believed, the testimony of the medical examiner who examined Wheeler's body was sufficiently corroborative of petitioner's confession. See A. 193-94.

Petitioner has possibly been misled by the trial court's comment to the jury that "outside of the confession, there [was] no evidence whatsoever to connect the defendant with the commission of the crime". A. at 795. The evidence mandated by §395 need not, however, corroborate a defendant's complicity in a murder, it must merely corroborate the defendant's statement that someone was murdered. People v. Louis, ^{7/}supra.

X.

Finally, Bush's petition presents a claim predicated on the Supreme Court's holding in Wardius v. Oregon, 412 US 470, 472 (1973), that the due process clause forbids enforcement of [notice-of-] alibi rules unless reciprocal rights are given to criminal defendants". At the time of Bush's trial -- more than two years before Wardius was decided -- then §295-1 of New York's Code of Criminal Pro-

cedure provided:

In all cases where a defendant has been indicted by a grand jury, the prosecuting officer may, not less than eight days before the case is moved for trial, serve upon such defendant or his counsel and file a demand which shall require that if such defendant intend to offer, for any purpose whatever, testimony which may tend to establish his presence elsewhere than at the scene of the crime at the time of its commission, he must within four days thereafter serve upon such prosecuting officer and file a bill of particulars which shall set forth in detail the place or places where the defendant claims to have been, together with the names, post-office addresses, residences, and places of employment of the witness upon whom he intends to rely to establish his presence elsewhere than at the scene of the crime at the time of its commission. Unless the defendant shall pursuant to such demand, serve and file such bill of particulars, the court, in the event that such testimony is sought to be interposed by the defendant upon the trial for any purpose whatever, or in the event that a witness not mentioned in such bill of particulars is called by the defendant to give such testimony, may exclude such testimony, or the testimony of such witness. In the event that the court shall allow such testimony, or the testimony of such witness, it must, upon motion of the prosecuting officer, grant an adjournment not to exceed three days.

Pursuant to this provision, the prosecution served upon Bush's counsel a demand for disclosure of (1) any alibi defense that might be presented at trial, and (2)

the names and addresses of possible alibi witnesses. After an unsuccessful pretrial attack upon the constitutionality of New York's notice-of-alibi rule, defense counsel complied with the prosecution's demand. Then, on the eve of trial he moved that the prosecution be directed to disclose the names and addresses of any rebuttal witnesses, but the motion was denied. As noted previously, Bush attempted to establish an alibi defense, and the prosecution called three witnesses to rebut it. By the time the case reached New York's Court of Appeals, Wardius had been decided. On the basis of that decision, the New York court held that the State's notice-of-alibi statute was unconstitutional, but declined to apply this holding retroactively in Bush's case. The court reasoned that retroactive application of Wardius would be appropriate only where, as was true in Wardius, a defendant had actually been foreclosed from presenting an alibi defense because of his failure to comply with a non-reciprocal notice-of-alibi statute. People v. Bush, 33 NY2d 921 (1973), cert. denied, 419 US 848 (1974). Bush contends, however, that Wardius should also be applied retroactively in cases such as this where application of the unconstitutional notice provision conceivably impaired the defendant's ability to impeach and surrebut the testimony of the State's

At least under the circumstances of this case, this contention must be rejected. The first of the State's three rebuttal witnesses was a Mr. Rawitz. He testified that Bush cashed a bad check at his Brooklyn bar on August 26, 1969, four days before the murder. While this testimony contradicted Bush's grand jury testimony, it was consistent with his testimony at trial. Presumably for this reason, Rawitz was not cross-examined.

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Green v. Fogg, 422 F Supp 1034, 1036 (SDNY 1976). Nor is there now any allegation of specific prejudice incurred by petitioner as a result of the State's refusal to disclose the identify of these witnesses prior to their testimony. See Mayer v. Moeykens, 373 F Supp 649, 654 (D Vt 1973), aff'd, 494 F2d 855 (CA2), cert. denied, 417 US 926 (1974).

"The test utilized repeatedly by [the Supreme] Court to ascertain whether 'new' constitutional protections in the area of criminal procedure are to be applied retroactively calls for consideration of three criteria: '(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.'" Michigan v. Payne, 412 US 47, 51 (1973) (citations omitted).

A. Purpose of the New Standard.

"Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect." Williams v. United States, 401 US 646,

653 (1971). Had application of the New York notice-of-alibi rule led to Bush's abandoning his alibi defense, the purpose of the Wardius doctrine might well have dictated a new trial, since the trial court's truth-finding function arguably would have been substantially impaired. See United States ex rel. Hairston v. Warden, 407 F Supp 524 (ND Ill), rev'd on other grounds, 539 F2d 713 (CA7 1976); People v. Bush, supra (dictum). Here, however, Bush was not deterred from presenting his alibi defense. Moreover, no continuance was requested, and no specific prejudice was then or has subsequently been alleged. Under such circumstances, the application of the unconstitutional notice provision in Bush's case should not be assumed to have "substantially" impaired the trial court's truth-finding functions. "[R]etroactivity is not required [merely] by a determination * * * that the truth-determining process has been aided somewhat by the new standard * * *." Gosa v. Mayden, 413 US 665, 680 (1973).

B. Reliance.

The Wardius doctrine was not clearly forecast by any prior decision of the Supreme Court. Indeed, in Williams v. Florida, 399 US 78, 82 n 11 (1970), where the Court upheld Florida's reciprocal notice-of-alibi statute,

it expressly noted that it was not deciding the constitutionality of NY Code Crim Proc §295-1. Nor can it be said that the Wardius decision was clearly forecast by any trend of lower court decisions. Under such circumstances, legislative and judicial reliance on the New York notice-of-alibi provision was justifiable.

C. Effect of Retroactive Application.

Because that reliance began in 1935 when the provision went into effect, the retroactive application of Wardius in cases such as this would almost certainly result in substantial interference with the administration of justice in New York, not to mention other states with similar statutes, e.g., Oregon and Illinois.

D. Conclusion.

Since all three of the relevant criteria articulated by the Supreme Court indicate that Bush should not be allowed to benefit from retroactive application of the Wardius doctrine, his claim to the contrary is rejected.

XI.

For the foregoing reasons, petitioner's applica-

tion for a writ of habeas corpus is dismissed

SO ORDERED.

Dated: Westbury, New York
May 23, 1977.



GEORGE C. PRATT
U. S. DISTRICT JUDGE

F O O T N O T E S

1/ Only with respect to one of petitioner's claims, does the State assert a failure to exhaust state remedies. However, that claim -- that the trial court committed constitutional error in admitting into evidence pretrial confessions elicited from Bush shortly after his unlawful arrest -- has been presented to the New York courts by means of a motion to vacate, filed with the trial court on February 19, 1976, pursuant to New York Criminal Procedure Law §440.10(1)(h). See Affidavit in Support of Motion to Vacate Judgment, filed with the Supreme Court, Kings County, at 1-2.

2/ Detective McCarthy gave the following testimony on the issue of probable cause. He and another detective arrested Bush on Dean Street in Brooklyn at 6:00 P.M. on February 17, 1970 for the murder of Robert Wheeler on August 30, 1969. A. at 3.

McCarthy had first heard of Bush on September 22, 1969, when an informant of unproven reliability advised him of Bush's involvement in the crime. The same informant gave similar information on two subsequent dates but admitted its hearsay nature and referred to petitioner as "Popcorn", not as Leon Bush. A. 64-65, 68-69.

Detective McCarthy was told by a second informant of unproven reliability that in early September of 1969 in an apartment at 216 Park Place, Far Rockaway, Brooklyn, while the informant and three others prepared to use drugs, one of the others stated, "Popcorn, you shouldn't have jugged [stabbed] him," to which the man addressed as Popcorn answered that he had stabbed the person because he had "hollered". A. 67-68, 72.

McCarthy was advised by a third "unproven" informant that he, the informant, had witnessed: first, a man known to him say to an unknown white man, "Popcorn didn't have to do that. I didn't know that he was stabbing him"; then the white man ask, "Why didn't you stop him?"; and finally, the first -- presumably black -- man reply, "I couldn't. I was holding his arms, and then I felt him go limp. He was hollering." A. at 68.

On October 24, 1969 a "girl" told McCarthy that Popcorn

was from New Orleans and that he was a cousin of an Edward Richardson. Apparently, this information eventually led to the detective's pre-arrest determination that Popcorn was Leon Bush. A. at 69.

Two persons claiming to have witnessed the crime advised the detective that it had been committed by two individuals who had escaped in an old car. A. at 79-80. McCarthy determined that the car was registered to a Charles Mitchell who lived at the 216 Park Place address where the second informant had claimed to have heard Popcorn admit to stabbing a man. A. at 71. McCarthy also determined that Popcorn visited Mitchell's house frequently. A. at 72.

Five minutes before arresting Bush, one of the three male informants referred to above told McCarthy by telephone that Popcorn was walking up Dean Street with another man and, when asked by McCarthy, "How closely does he [Popcorn] resemble the photo?", replied, "It's the same." A. at 62-63.

McCarthy and another detective proceeded to Dean Street where they accosted Bush and a companion. When asked to identify himself, petitioner claimed he was Donald, not Leon, Bush. A. at 5. He and his companion were then arrested for the murder of Robert Wheeler. A. at 3.

The trial judge's factual and legal conclusions on the arrest issue were as follows:

On the Morales issue, I hold that the officer had probable cause to take the defendant in custody. A. at 81.

* * *

On February 17, 1970, the arresting officer, Detective McCarthy, had within his person[al] knowledge a statement from someone [Popcorn] which would give him a reasonable cause to place the person allegedly making this statement to that civilian [the informant] that he [Popcorn] participated in the commission of a crime in words or substance, to take him into custody and take him to the stationhouse.

A. at 245.

3/ Represented by retained counsel, Bush appealed unsuccessfully on other grounds to both the Appellate Division, Second Department, and the Court of Appeals. 335 NYS2d 370 (2d Dep't 1972), aff'd, 33 NY2d 921 (1973), cert. denied, 419 US 848 (1974). Later, however, he renewed the unlawful arrest claim by a motion to vacate filed pursuant to NYCPL §440.10(1)(h). The motion was denied, apparently without a hearing, on April 13, 1976 by the Supreme Court, Kings County, and leave to appeal was denied by both the Appellate Division and the Court of Appeals on July 20, 1976 and August 19, 1976, respectively.

4/ A criminal defendant in a state court has a right to an "impartial jury" under both the sixth amendment and the due process clause. Ristaino v. Ross, 424 US 589, 595 n 6 (1976), and cases there cited.

5/ Petitioner does not specifically allege that the trial court did not examine any of the prospective jurors individually. His petition sets forth the claim that he was denied an impartial jury by merely quoting the relevant portions of the transcript which preceded and followed the unrecorded voir dire. Prior to the jury's selection, defense counsel indicated his belief that the court would not examine the veniremen individually. A. at 261. After the voir dire, the court commented to the jury:

Mr. Foreman and gentlemen of the jury, the Court is delighted at the reasonable speed that was exercised by both lawyers in their choice of the jury.

I may as well tell you that prior to this time, when the rules were changed, the lawyers picked the jury, and each juror was questioned individually ad infinitum. But in making the new rules by the Judicial Conference, in no way is it intended to deprive the defendant of the right to question a prospective juror to ascertain whether they are really qualified to be fair jurors to both sides.

A. at 264.

Thus, it is unclear whether any veniremen were questioned individually. In any event, for present purposes it is assumed

that none were.

6/ It is unclear whether petitioner challenges his sentences on grounds other than the double jeopardy clause. If so, the contention would appear to be that his sentences were excessive. See Petition at 11. But the sentences are not susceptible to constitutional attack since they do not exceed the maximum punishments then allowable under New York Penal Law §§ 70.00, 125.15, and 125.25. See Fielding v. LeFevre, slip op at 1495 (CA2 Jan 19, 1977).

7/ After completing its charge, the trial court asked if there were any exceptions. Understandably, petitioner's trial counsel did not object to the court's instructions on either the alibi defense or the corroborative evidence requirement.

APPENDIX C

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. LEON
Bush, Appellant.

Argued November 19, 1973; decided December 23, 1973.

Crimes—murder—notice of alibi—selection of jury—contentions by defendant, convicted of felony murder and manslaughter, that trial court's selection of jury under procedure then mandated by Judicial Conference (22 NYCRR 20.13) was violative of his rights to fair trial, that absence of reciprocity in notice-of-alibi statute (Code Crim. Pro., § 295-1) rendered it unconstitutional, that record did not support trial court's finding as to voluntariness of statements made by him, that remarks made by prosecutor during summation deprived him of fair trial, and that trial court committed reversible errors in its charge—judgment of conviction was properly affirmed—however, section 295-1 of Code of Criminal Procedure is held unconstitutional, with this decision to apply to cases in which trial began after June 11, 1973, date of United States Supreme Court decision holding similar notice-of-alibi statute of Oregon unconstitutional (*Wardius v. Oregon*, 412 U. S. 470), but not to cases where trial began prior to that date unless defendant was prevented from introducing testimony to support his alibi defense as sanction for his failure to comply with notice-of-alibi statute—Court of Appeals does not reach question of retroactivity on direct appeal in such cases—defendant's other contentions are without merit.

People v. Bush, 40 A D 2d 591, affirmed.

C

APPEAL, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered July 5, 1972, which affirmed a judgment of the Supreme Court (HYMAN BARSHAY, J.), rendered in Kings County upon a verdict convicting defendant of felony murder and manslaughter in the second degree. The indictment charged defendant with felony murder and common-law murder, based on the fatal stabbing of one Robert Wheeler on August 30, 1969. At the time of defendant's trial, in 1971, rule 20.13 of the Rules of the Administrative Board of the Judicial Conference (22 NYCRR 20.13) provided that "A *voir dire* examination in any criminal cause shall be conducted following the selection of prospective jurors. The judge presiding shall initiate the *voir dire* examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case. The judge shall then put to the prospective jurors any questions which he thinks necessary, affecting their qualifications to serve as jurors in the cause on trial. The judge may also, in his discretion, permit both parties, commencing with the people, to examine the prospective jurors, individually or collectively, to the extent he deems necessary, regarding their qualifications to serve as jurors." (Cf. CPL 270.15, added by L. 1970, ch. 996, eff. Sept. 1, 1971.) Section 295-1 of the Code of Criminal Procedure, which was then in effect, provided that "In all cases where a defendant has been indicted by a grand jury, the prosecuting officer may, not less than eight days before the case is moved for trial, serve upon such defendant or his counsel and file a demand which shall require that if such defendant intend to offer, for any purpose whatever, testimony which may tend to establish his presence elsewhere than at the scene of the crime at the time of its commission, he must within four days thereafter serve upon such prosecuting officer and file a bill of particulars which shall set forth in detail the place or places where the defendant claims to have been, together with the names, post-office addresses, residences, and places of employment of the witnesses upon whom he intends to rely to establish his presence elsewhere than at the scene of the crime at the time of its commission. Unless the defendant shall, pursuant to such demand, serve and file such bill of particulars, the court, in the event that such testimony is sought to be interposed by the defendant upon the trial for any purpose whatever, or in the event that a witness not mentioned in such bill of particulars is called by the defendant to give such testimony, may

exclude such testimony, or the testimony of such witness. In the event that the court shall allow such testimony, or the testimony of such witness, it must, upon motion of the prosecuting officer, grant an adjournment not to exceed three days." (Cf. CPL 250.20.) In the Court of Appeals defendant argued, *inter alia*, that the trial court's selection of a jury under the procedure mandated by the Judicial Conference was violative of his rights to a fair trial; that the absence of reciprocity in the notice-of-alibi statute rendered it unconstitutional; that the record did not support a finding, made by the trial court following a pre-trial hearing, that the voluntariness of oral, written and type-written statements made by him had been established beyond a reasonable doubt; that remarks made by the prosecutor during his summation deprived him of a fair trial, and that the trial court committed reversible errors in its charge.

David T. Berman for appellant.

Eugene Gold, District Attorney (*Roger Bennet Adler* of counsel), for respondent.

Per Curiam. We find no significant difference between section 295-1 of the Code of Criminal Procedure, applicable here, and the notice-of-alibi statute of the State of Oregon held unconstitutional by the United States Supreme Court in *Wardius v. Oregon* (412 U. S. 470). Accordingly we hold section 295-1 unconstitutional.

We recognize, however, "the principle that in criminal litigation concerning constitutional claims, 'the Court may in the interest of justice make the rule prospective'" (*Johnson v. New Jersey*, 384 U. S. 719, 726). In our view section 295-1 as applied in this instance did not operate to exclude testimony. In response to the District Attorney's demand, defendant here furnished the names of his alibi witnesses. Their testimony was admitted on trial, as was that of the prosecution's rebuttal witnesses. The statute operated only to deny defendant advance notice of the identity of these rebuttal witnesses, and to this extent to hinder his preparation to impeach, discredit or rebut their testimony. He was not, however, inhibited in his own opportunity by direct evidence to establish his alibi. The infringement of defendant's rights went only to a collateral though not unimportant issue. Thus, we conclude that on this record the operation of the rule did not go to "the very integrity of the fact-finding process"; rather it touched on procedural fairness to defendant.

On the basis of this evaluation we hold that *Wardius* and our present decision shall apply to cases in which the trial began after June 11, 1973, the date of the Supreme Court decision in *Wardius* (cf. *Linkletter v. Walker*, 381 U. S. 618; *Tehan v. Shott*, 382 U. S. 406; *Johnson v. New Jersey*, *supra*; *Stovall v. Denno*, 388 U. S. 293; see *People ex rel. Cadogan v. McMann*, 24 N Y 2d 233), but shall not apply to cases where the trial began prior to that date, unless, as occurred in *Wardius* but unlike the situation here, the rule was applied to prevent a defendant from introducing testimony to support his alibi defense as a sanction for his failure to comply with the notice-of-alibi statute.

We do not reach the question as to retroactivity on direct appeal in such cases and leave that determination to another day.

We have examined appellant's other contentions and find them to be without merit.

Accordingly the order of the Appellate Division is affirmed.

Judges BURKE, BREITEL, JASEN, GABRIELLI, JONES and WACHTLER concur in *Per Curiam* opinion; Chief Judge FULD taking no part.

Order affirmed.

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CERTIFICATE OF SERVICE

January 13 1978

I certify that a copy of this brief and appendix
has been mailed to the Attorney General of the State
of New York.

Steven B. Banner